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**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA**

In re:	)	Case No. 09-26400-D-13L
ANGELINA C. CHAVEZ,	)	
	)	
Debtor.	)	
_____	)	
ANGELINA C. CHAVEZ,	)	Adv. Pro. No. 09-2283-D
	)	
Plaintiff,	)	Docket Control No. PD-2
	)	
v.	)	
	)	
BANK OF AMERICA, et al.,	)	
	)	
Defendants.	)	Date: August 18, 2009
_____	)	Time: 1:00 p.m.
	)	Dept: D

**This memorandum decision is not approved for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of claim preclusion or issue preclusion.**

**MEMORANDUM DECISION**

On July 13, 2009, the defendant herein, Bank of America, N.A. (who will be referred to as "the bank"), filed a motion to dismiss the complaint for lack of standing and for failure to state a claim upon which relief can be granted, bearing Docket Control No. PD-2 (the "Motion"). For the reasons set forth below, the court will grant the Motion in part.

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1 analyzing the complaint before it in terms of whether it  
2 contained enough factual allegations, taken as true, to plausibly  
3 suggest that the plaintiff was entitled to relief. Bell Atl.  
4 Corp. v. Twombly, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929, 945  
5 (2007). "[W]e do not require heightened fact pleading of  
6 specifics, but only enough facts to state a claim to relief that  
7 is plausible on its face." 127 S. Ct. at 1974.

8 The Court did not disturb its earlier pronouncement in  
9 Scheuer v. Rhodes, 416 U.S. 232, 94 S. Ct. 1683 (1974), that on a  
10 motion to dismiss, "[t]he issue is not whether a plaintiff will  
11 ultimately prevail but whether the claimant is entitled to offer  
12 evidence to support the claims." 416 U.S. at 236. Thus, "a  
13 well-pleaded complaint may proceed even if it appears 'that a  
14 recovery is very remote and unlikely.'" Bell Atl. Corp., 127 S.  
15 Ct. at 1965, quoting and characterizing Scheuer v. Rhodes, 416  
16 U.S. at 236.

17 B. The Debtor's Standing

18 The bank's first argument is that the debtor does not have  
19 standing to pursue her claims against the bank because those  
20 claims are property of the bankruptcy estate which the debtor may  
21 not prosecute unless they are abandoned by the chapter 13  
22 trustee. The bank relies on Bostonian v. Liberty Savings Bank,  
23 52 Cal.App.4th 1075 (1997).

24 Bostonian involved a chapter 7 case and a chapter 7 trustee.  
25 In contrast to chapter 7, a chapter 13 debtor retains possession  
26 of property of the estate. 11 U.S.C. § 1306(b). Further,  
27 chapter 13 trustees, unlike chapter 7 trustees, do not have the  
28 duty to "collect and reduce to money the property of the estate."

1 §§ 1302(b)(1), 704(a)(1). For these and the other reasons set  
2 forth in Houston v. Eiler (In re Cohen), 305 B.R. 886, 891-900  
3 (9th Cir. BAP 2004), and based on the extensive analysis set  
4 forth in that case, the court concludes that the debtor in the  
5 present case has standing to pursue her causes of action against  
6 the bank.

7 C. Claim for Rescission

8 Next, the bank contends that the complaint fails to state a  
9 claim for rescission of the loan transaction and cancellation of  
10 the bank's lien, because the debtor is unable to repay the loan  
11 proceeds.

12 The various steps involved in the rescission process are set  
13 forth in 15 U.S.C. § 1635(b). In general terms, the borrower  
14 gives notice of rescission; within 20 days thereafter, the  
15 creditor must terminate its security interest, and thereafter,  
16 the borrower must tender to the creditor the property he received  
17 in the loan transaction, less finance or other charges.

18 Despite this stated sequence of events, it is clear in this  
19 circuit that the court has discretion to condition a borrower's  
20 right to rescission on his or her tender of the loan proceeds,  
21 less finance charges and other charges. See Yamamoto v. Bank of  
22 New York, 329 F.3d 1167, 1173 (9th Cir. 2003) ["a court may  
23 impose conditions on rescission that assure that the borrower  
24 meets her obligations once the creditor has performed its  
25 obligations."]; La Grone v. Johnson, 534 F.2d 1360, 1362 (9th  
26 Cir. 1976); Palmer v. Wilson, 502 F.2d 860 (9th Cir. 1974).

27 The bank's argument in support of dismissal would, in  
28 essence, require that a court always condition rescission on the

1 borrower's prior tender of the loan proceeds. As set forth  
2 above, the sequence of the rescission procedures is a matter of  
3 the court's discretion. For this reason, as to the debtor's  
4 claim for rescission, the Motion will be denied.

5 Further, the bank's argument on this point focuses on  
6 alleged facts beyond the face of the debtor's complaint, and  
7 thus, is not a ground for dismissal under Rule 12(b)(6). Swartz  
8 v. KPMG LLP, 476 F.3d 756, 763 (9th Cir. 2007). The court notes  
9 that in Yamamoto, the borrower's inability to tender repayment  
10 was held to provide sufficient grounds for summary judgment.<sup>2</sup>

11 D. Claim for Damages

12 In addition to the remedy of rescission, TILA provides for  
13 damages, which the debtor in this case also seeks:

14 In any action in which it is determined that a creditor  
15 has violated this section, in addition to rescission  
16 the court may award relief under section 1640 of this  
title for violations of this subchapter not relating to  
the right to rescind.

17 15 U.S.C. § 1635(g).

18 The bank contends that the debtor's claims for damages for  
19 violation of TILA are barred by the one-year statute of  
20 limitations of 15 U.S.C. § 1640(e).<sup>3</sup> The court agrees. Hubbard  
21 v. Fidelity Federal Bank, 91 F.3d 75, 79 (9th Cir. 1996); Brewer  
22 v. Indymac Bank, 609 F.Supp.2d 1104 \*15-16 (E.D. Cal. 2009);

23  
24 2. "[I]n the circumstances of this case, the court did not  
25 lack discretion to modify the sequence of rescission events to  
26 assure that [the borrower] could repay the loan proceeds before  
going through the empty (and expensive) exercise of a trial on  
the merits." Yamamoto at 1173.

27 3. "Any action under this section may be brought . . .  
28 within one year from the date of the occurrence of the  
violation." 15 U.S.C. § 1640(e).

1 Garza v. American Home Mortgage, 2009 U.S. Dist. LEXIS 7448 \*15-  
2 16 (E.D. Cal. 2009).

3       The one year runs from the date of consummation of the  
4 transaction, subject to considerations of equitable tolling.  
5 King v. California, 784 F.2d 910, 915 (9th Cir. 1986). In the  
6 present case, it appears undisputed that the loan transaction was  
7 consummated on September 22, 2005. The debtor did not file her  
8 complaint until May 13, 2009, over three years later; thus, her  
9 claims for damages are barred.

10       The debtor has explicitly chosen not to assert equitable  
11 tolling,<sup>4</sup> contending instead that the one-year period runs from  
12 the date of her notice of rescission, September 22, 2008.  
13 Because the complaint was filed within one year from that date,  
14 she argues, it is timely.

15       The debtor is not correct. The giving of a notice of  
16 rescission within the three-year period of § 1635(f) provides the  
17 borrower an additional one year from the creditor's refusal to  
18 rescind in which to file suit for rescission (Miguel v. Country  
19 Funding Corp., 309 F.3d 1161, 1165 (9th Cir. 2002); Brewer, 609  
20 F.Supp.2d at 1155); it does not commence a new one-year period  
21 for seeking damages. Brewer, 609 F.Supp.2d at 1155 [expressly  
22 rejecting the contention that the creditor's failure to cancel  
23 the loan extends the statute of limitations for all TILA  
24 violations]; see also Garza, at \*15-16 [dismissing cause of  
25 action for damages under one-year statute of limitations, even  
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27  
28       4. Debtor's response to the Motion, filed July 30, 2009,  
8:11-12.

1 though borrower had given notice of rescission within the three-  
2 year period].

3 Because the debtor's complaint in this case was filed after  
4 the expiration of the one-year statute of limitations, her claims  
5 for damages, whether denominated actual damages, compensatory  
6 damages, or statutory damages, will be dismissed.<sup>5</sup>

7 E. Claim for Declaratory Relief

8 Next, the debtor seeks a declaration the bank has violated  
9 15 U.S.C. § 1641(f)(2) by failing to respond to the debtor's  
10 request for the name, address, and telephone number of the owner  
11 or master servicer of the obligation secured by the deed of  
12 trust. The bank moves to dismiss this cause of action on the  
13 ground that the letter attached to the complaint, by which the  
14 debtor purportedly made the request, does not in fact request the  
15 information.

16 It is clear from the debtor's response that she  
17 inadvertently failed to attach the referenced letter as an  
18 exhibit. The court will permit the debtor to amend her complaint  
19 to attach a copy of the relevant letter.

20 F. Claim for RESPA Damages

21 Finally, the bank challenges the debtor's claim for damages  
22 under the Real Estate Settlement Procedures Act, 12 U.S.C. §§  
23 2601, et seq. ("RESPA"), on the ground that the letter attached  
24 to the debtor's complaint does not constitute a qualified written  
25 / / /

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26  
27 5. The debtor's ability to claim a credit for finance and  
28 other charges remains a part of her rescission cause of action,  
under 15 U.S.C. § 1635(b).

1 request for information, as that term is defined in 12 U.S.C. §  
2 2605(e)(1)(B).

3 The debtor's response is, as above, that she failed to  
4 attach the relevant letter to her complaint. The court will  
5 permit the debtor to amend her complaint to attach a copy of the  
6 letter.

7 The court agrees with the bank that the debtor has failed to  
8 allege facts supporting her claim for actual damages for the  
9 alleged RESPA violation, but will grant the debtor leave to  
10 amend. As to statutory damages under RESPA, the debtor alleges  
11 only a failure to respond to a single qualified written request.  
12 This allegation, even if true, would not constitute a "pattern or  
13 practice of noncompliance" sufficient to justify an award of  
14 statutory damages under 12 U.S.C. § 2605(f)(1)(B). In re  
15 Tomasevic, 273 B.R. 682, 686-87 (Bankr. M.D. Fla. 2002). Thus,  
16 the bank's motion to dismiss the claim for statutory damages for  
17 violation of RESPA will be granted.

18 III. CONCLUSION

19 For the foregoing reasons, the court concludes that the  
20 debtor's claims for damages are barred by the one-year statute of  
21 limitations of 15 U.S.C. § 1640(e), and as to those claims, the  
22 court will grant the bank's Motion. As to the debtor's claim for  
23 a declaration the bank has violated 15 U.S.C. § 1641(f)(2)  
24 (request for contact information for owner or master servicer)  
25 and her claim for actual damages under RESPA, the Motion will be  
26 granted, but the debtor will be granted leave to amend her  
27 complaint. As to the debtor's claim for statutory damages for

28 / / /



1 violation of RESPA, the Motion will be granted. Except as set  
2 forth above, the Motion will be denied.

3 The court will issue an appropriate order.

4 Dated: August 27, 2009



5 ROBERT S. BARDWIL  
6 United States Bankruptcy Judge  
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**CERTIFICATE OF MAILING**

I, Andrea Lovgren, in the performance of my duties as assistant to the Honorable Robert S. Bardwil, mailed by ordinary mail a true copy of the attached document to each of the parties listed below:

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DATE: AUG 27 2009

  
\_\_\_\_\_  
Andrea Lovgren